Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term 1994

NEAL W. THOMPSON, and
PRECISION PROCESSING, INC.

Petitioners,

v.

KENTUCKY FRIED CHICKEN
CORPORATION, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States District Court for the Western District of Kentucky-Louisville Division and the United States Court of Appeals for the Sixth Circuit (hereinafter "the Courts below") improperly applied the statute of limitations of Kentucky, to a tort which admittedly did not and could not have accrued or occurred within Kentucky?

2. Whether Defendants' Attorneys Skadden, Arps, Slate, Meagher and Flom violated their duty of candor to the Courts below, as set forth in Demjanjuk v. Petrovsky, 10 F.3d 338, 348, 349, 352, 353, 354, 355 (6th Cir. 1993) by inter alia advising the Courts below that if Defendants (hereinafter "KFC") misappropriated Plaintiffs' (hereinafter "Thompson"

or "Mr. Thompson") trade secrets, said theft had to have occurred in Kentucky in 1967 and 1968 when council for KFC knew that:

A. No relevant event or events took place in Kentucky in 1967 or 1968;

B. None of the agents, servants or employees of KFC who were involved in the theft of trade secrets were ever physically within Kentucky in 1967 or 1968;

C. KFC did not move its principal place of business, its Corporate Headquarters or its Research and Development Department to Kentucky until 1969; and

D. Each and every cooker into which KFC incorporated Thompson's trade secrets was manufactured in a state other than Kentucky?

3. Whether the Sixth Circuit improperly concluded, while ignoring allegations to the contrary in the Complaint as well as the findings of the District Court, that each of Thompson's causes of actions, including the 1984 violation of civil rights and the 1984 breach of contract, "stemmed from" the 1967/1968 theft of trade secrets, (see Appendix at B-2 and A-16, 17, 18, 19 and 20)?

4. Whether the Courts below erred by finding as a matter of law that the only written contract between the parties (the "Joint Development Agreement" - "JDA") was at the same time both:

   A. Unenforceable as a contract because of vagueness, and

   B. Enforceable as a contract so as to bar a civil rights cause of

action under part "III" of the decision in Patterson v. McLean, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed. 136 (1989)?

5. Whether the above "unenforceable", but yet "enforceable", "Joint Development Agreement" contract to test Thompson's equipment bars, under part "IV" of Patterson, supra, Thompson's civil rights cause of action arising out of KFC's 1984 refusal to enter into a "new and distinct" contract to buy Thompson's equipment?

6. Does the fact that Mr. Thompson, a 70 year old black individual, testified from his experiences in the 1930s, 1940s, 1950s, 1960s, 1970s, and 1980s, that he believed that certain employees of KFC, in a general sense, had been racially prejudiced against

him in the '60s, '70s, and '80s, bar a specifically pleaded cause of action for a racially motivated theft of trade secrets which was not discovered under Pennsylvania's "discovery" statute of limitations until February of 1984?

7. Does Thompson's opinion as to KFC's past history of racial prejudice grant KFC *carte blanche* to continue and to renew its racially prejudiced activities again in 1982 and 1984.

8. At the summary judgment level did the Courts below improperly resolve disputed issues of fact and did they do so by improperly drawing all inferences in the light most favorable to the party making the motion, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); Celotex Corp. v. Catrell,

477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

9. Do the responses to the above questions establish that the Courts below and/or KFC's council have "so far departed from the accepted and usual course of judicial proceedings" that this Court is required to intervene and to thereby permit Thompson to exercise his civil rights by proceeding to a civil trial for the purpose of inter alia securing his civil rights (see Rule 10 of the Rules of the Supreme Court of the United States)?

STATEMENT UNDER RULE 28.1

Plaintiff Precision Processing, Inc. is a closely held corporation and it has no subsidiaries.

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OPINIONS BELOW

The Opinions below are unreported. Copies of those unreported Opinions are attached hereto at Appendix A, B, and C.

JURISDICTION OF THIS COURT

This Supreme Court has jurisdiction over this Petition under United States Constitution Article 3, Section 2, and 28 U.S.C. Section 1254 to review the Memorandum Opinions of the United States Court of Appeals for the Sixth Circuit and the Decisions of the United States District Court for the Western District of Kentucky at Louisville.

The Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit affirming the granting of summary judgment by the United States District Court for the Western District of Kentucky at Louisville sought to be reviewed here was entered on March 23, 1994. The

Petitioner here filed a timely Petition for Rehearing, which was denied by Order of the United States Court of Appeals for the Sixth Circuit on April 29, 1994 (see Appendix A, B and C).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THIS CASE

42 U.S.C.A. §1981 (Civil Rights Act of 1964) - See Appendix D

Rule 10 of the Supreme Court of the United States of America - See Appendix E

STATEMENT OF CASE

Procedural

This is an appeal from the granting of the Motion for Summary Judgment of KFC, and the dismissal of each cause of action of Thompson.

In granting KFC's Motion for Summary Judgment the Courts below were required to draw all of the inferences from the evidence in the light most favorable to

Thompson and to conclude, if possible, that KFC had met its burden of establishing that there remained no genuine disputes as to material facts. In arriving at that conclusion, the Courts below were not permitted to resolve any existing disputes in order to find that KFC met its burden, see Anderson, Celotex, and Matsushita, supra at V.

Factual

In the early to mid 1960s, Mr. Thompson, a black businessman, invented a fully automatic chicken fryer which was designed for use in commercial establishments such as KFC's franchisee owned stores. Mr. Thompson's cooker included aspects which were patented in 1974 as well as other aspects which, as of 1967/1968, were trade secrets. In 1967/1968 KFC, as well as the entire industry, was using only manually operated pressure

cookers which were hardly more sophisticated than the pressure cookers being used in the average home and which cooked inconsistent chicken.

In August of 1967 and under the protection of a written Confidentiality Agreement, Mr. Thompson demonstrated his equipment to KFC in Pittsburgh, PA and in November of 1967 Thompson permitted KFC's patent attorneys to review in Washington, DC or New York City his entire patent application which at the time was not a public document.

In December of 1967, Mr. Thompson and Mr. Greer of KFC agreed that Mr. Parker of KFC would be sent by KFC from Tennessee to Pittsburgh to test Thompson's equipment.

During discovery Thompson learned for the first time that the Chief Executive Officer of KFC, Mr. Massey, instructed Mr. Parker, while they were both on an

airplane from Tennessee to Pittsburgh, not to test Thompson's equipment; that Mr. Parker and/or Mr. Massey then informed Mr. Greer that it was Mr. Thompson who had refused to permit Mr. Parker to test Mr. Thompson's equipment; that by January of 1968 KFC, in Tennessee, had prepared electrical drawings describing a machine which used some of the trade secrets described in Thompson's 1967 patent application; that by March of 1968 KFC had, in Tennessee, designed and built and was in the process of testing a fully automatic cooker which it designated as it's 10-3 cooker; and that by January of 1969 KFC was marketing, from Tennessee, to its franchisee owned stores 10-3 cookers which used the trade secrets described in Thompson's 1967 patent application.

By late 1969 KFC moved its principal place of business, its Corporate Headquarters and its Research and Development Department from Tennessee to Kentucky.

Based upoon the foregoing, it is obvious that no actions relevant to the 1967/1968 theft of trade secrets took place in Kentucky. All demonstrations or reviews of Thompson's technology took place in Pittsburgh, PA, New York City, NY, or Washington, DC; and all individuals involved in the theft or the use of Thompson's trade secrets resided in Tennessee.

Also at no time herein relevant did KFC ever manufacture any cooker in Kentucky.

In 1972 KFC again agreed to test Thompson's equipment and did so from 1972 through 1974. In KFC's summaries of that testing, which was done entirely by KFC

employees, KFC concluded inter alia that Thompson's equipment cooked the "perfect Kentucky Fried Chicken" and KFC also estimated that Thompson's cooker would save KFC approximately $780,000 a year in oil costs. Notwithstanding the above conclusions KFC again refused to deal with Mr. Thompson and thereby refused its franchisees permission to purchase any automatic cooker other than KFC's 10-3.

In 1981 KFC again inspected Thompson's equipment and notwithstanding the fact that KFC's outside consultant and the head of KFC's Research and Development Department both recommended testing, KFC refused to test and again refused to approve Thompson's equipment for uses by its franchisees.

After the above refusal, Thompson secured Underwriters Laboratory approval

for his equipment as well as approval by the National Sanitation Foundation.

In 1982 KFC entered into an agreement with the Reverend Jesse Jackson and PUSH whereunder KFC agreed to improve its dealings with minority vendors and to improve its hiring of minorities. In 1982 KFC and Thompson entered into a "Joint Development Agreement" under which KFC and Thompson were to "jointly test" and to "jointly evaluate" Thompson's equipment. If Thompson's equipment passed the "joint testing and evaluation" - that is if Thompson's equipment cooked "at parity" with other approved cookers - KFC agreed to negotiate a new and distinct contract to purchase Thompson's equipment.

Ultimately KFC performed <u>all</u> of the "joint" tests and KFC unilaterally prepared <u>all</u> of the evaluations which were captioned "Technical Summary" and/or

"Management Summary". These evaluations were distributed internally to KFC's upper management, including KFC's Chief Executive Officer. In the version of a "Management Summary" given to KFC's Chief Executive Officer by Dr. Rao, Head of KFC's Research and Development Department, Dr. Rao concluded not only that Thompson's equipment cooked "at parity", but Dr. Rao also concluded inter alia that Thompson's cooker reduced cooking time by 35% and saved approximately $500,000 a year in milk and egg dip.

This version of Dr. Rao's "Management Summary" was not given to Thompson until after this suit was filed.

Dr. Rao, in the version of the "Management Summary" which was given to Thompson in 1984, concluded based upon the same testing as evaluated by the same KFC

employees that Thompson's cooker did not cook "at parity".

At his deposition Dr. Rao could not explain, and KFC to this date has been unable to explain how one set of tests conducted entirely by KFC could establish that Thompson's equipment cooked both "at parity" and "not at parity".

During the above testing Thompson for the first time inspected a KFC 10-3 cooker and found that KFC had misappropriated some of his trade secrets. Within one year of that discovery, Thompson filed this suit.

In this suit and in addition to the counts for the theft of his trade secrets and the racial motivation thereof, Thompson alleges inter alia various other independent causes of action, i.e. in 1984 KFC fraudulently breached the "JDA"; in 1984 KFC because of its racial prejudice

refused to enter into a "new and distinct" contract to purchase Thompson's equipment; in 1984 KFC because of its racial prejudice refused to permit its franchisees to purchase Thompson's equipment.

REASONS FOR GRANTING THE WRIT

I. Summary of Argument

The Courts below made findings of fact which all parties hereto admit are incorrect and the Courts below further found that the same contract was at the same time both "enforceable" and "unenforceable", and thereby dismissed each of Thompson's causes of actions for reasons which are by definition contradictory and/or unsupportable by any evidence, rule of law or school of logic.

Thompson here submits that the above actions have "so far departed from the accepted and usual course of judicial

proceedings" to require this Court to intervene.

Thompson further submits that the decisions below are so blatantly improper that they, unfortunately, could raise a question as to whether or not the Courts below have the budget, the time, the staffing or the inclination to sit at a civil trial brought by a black individual against a major corporation which will and has already made every attempt to unduly delay and extend the trial by means of sophistry and obfuscation.

II. Statutes of Limitations - 1967/1968 Claims

At the summary judgment level KFC in its Brief and at oral arguments, advised the District Court that if KFC misappropriated Thompson's trade secrets, that cause of action occurred or accrued in Kentucky where KFC made the decisions to

misappropriate, where KFC incorporated the trade secrets, and where KFC manufactured, sold and repaired the 10-3 cookers which used Thompson's trade secrets.

The District Court found all of the above statements of KFC council to be true (see Appendix here at A-7), and applying Kentucky's ten year statute of limitation dismissed all causes of action which either arose out of the theft of the trade secrets or arose out of the racial motivation for the theft of trade secrets.

At page 18 of KFC's Brief of Defendants/Appellees, in KFC's Answer to Interrogatory 30 and elsewhere, KFC has admitted that the above factual statements by KFC's council and findings of fact by the District Court are incorrect, Demjanjuk v. Petrovsky, 10 F.3d 338, 348, 349, 352, 353, 354, 355 (6th Cir. 1993).

Since both KFC and Thompson agree that if the theft of trade secrets took place, it took place in either Tennessee or Pennsylvania, the "discovery" statutes of either state apply. Those statutes, in general, hold that a plaintiff may file a complaint within a specified number of years after the plaintiff "discovered" the existence of the cause of action, Mackey v. Judy's Food, Inc., 654 F.Supp. 1465, 1471, 1472 (M.D. Tenn. 1987); Mack Trucks, Inc. v. Bendix, 372 F.2d 18, 20, 21 (3rd Cir. 1966) and as cited by KFC, Pierce v. Rossetta Corp., et al, No. 88-5873 (E.D. Pa. 1991) (LEXIS Gen. Fed. Library Dist. file).

Here Thompson has testified in his Summary Judgment Affidavit and elsewhere that he did not "discover" the theft of trade secrets until February of 1984. Since the Complaint here was filed within

one year of that "discovery", all causes of action arising out of the theft of trade secrets and the racial motivation for the theft of trade secrets have been filed in a timely fashion under either the Pennsylvania, the Tennessee or the Federal statutes of limitations and the decisions of the Courts below must be overturned.

It should be noted here that KFC attempted to dispute Thompson's testimony and argued that Thompson knew of the theft of his trade secrets at an earlier date and therefore argued that Thompson did not file his Complaint within a timely fashion. The District Court, however, did not resolve that factual dispute, as is proper, at the summary judgment level (see Appendix A-11 and 12).

It should also be noted that after eight years of discovery, which included the taking of five depositions of the

three "alleged" inventors of KFC's cooker (the depositions of two of the alleged inventors were taken twice), and after the expenditure by KFC of in excess of $2,000,000 in legal fees, KFC was not able to show to the Courts below where, how and from whom KFC developed its 10-3 cookers (see Appendix A-4).

It should also be noted that the Sixth Circuit incorrectly concluded that all of Thompson's causes of actions "stemmed from" the theft of trade secrets (Appendix B-2). A review of the Complaint herein will establish that Thompson pleaded separate causes of action for the breach of contract and the violation of his civil rights which arose in the 1982/1984 time frame. These 1984 causes of action as pleaded, remain viable without regard to whether or not KFC misappropriated Thompson's trade secrets,

without regard to whether that misappropriation was racially motivated, and without regard to whether or not Thompson knew of the theft of trade secrets or the racial motivation thereof at some date prior to February of 1984.

III. The 1984 "Joint Development Agreement" is "Unenforceable"

The portion of the District Court's Memorandum dealing with this issue is attached at Appendix A-18, 19 and 20. In summary, the Courts below found as a matter of law that Thompson had no contractual right to be present at the joint testing described in the "Joint Development Agreement", because the word "joint" was not "defined" and that the "Joint Development Agreement" was therefore so vague and ambiguous as to be unenforceable.

Thompson submits that requiring, as a matter of law, that the word "joint" be defined when used in a contract involving two parties defies logic. Clearly, the contract involved only two parties, and giving the word "joint" any conceivable definition, it is obvious that the contract is not ambiguous. The "Joint Development Agreement" specifically stated that both KFC and Thompson would test and evaluate his cooker.

It is undisputed that Thompson was not involved in any of the individual tests. It is undisputed that Thompson was not involved in any of the evaluations. It is not disputed that KFC conducted each and every one of the individual tests and that KFC prepared totally on its own each and every evaluation of those tests. It cannot be disputed, even after giving the word "joint" any conceivable definition,

that KFC, by its unilateral actions, breached both its duties of good faith and its written contractual duties under the "JDA".

Even if one were to assume that there is a reasonable dispute as to the meaning of the word "joint", the Court again resolved that dispute which is improper at a summary judgment level, and the Court again resolved that dispute by extending all favorable inferences to KFC and not to Thompson. The Courts below further resolved an ambiguity in favor of the creator of the ambiguity.

Assuming for the sake of argument that the word "joint" must be definied in all two party contracts or only in this two party contract, the Courts below still erred in finding that no evidence existed of a breach of the "JDA". Assuming that Thompson had no contractual right to

become involved in the "joint" testing, KFC had no right to prepare conflicting reports of tests.

Here, it is again undisputed that Dr. Rao, the head of KFC's Research and Development Department, personally authored two conflicting "Management Summaries". In a version of the "Management Summary" which was not given to Thompson until after suit was filed, Dr. Rao simply declares unequivocally that Thompson's equipment cooked "at parity" and therefore, by KFC's definition, Thompson's equipment passed KFC's test. In the version of the "Management Summary" given to Thompson in 1984, Dr. Rao simply contradicts himself and says that Thompson's equipment did not cook "at parity". Here, Dr. Rao and KFC simply committed a fraud.

If the above does not constitute a fraud, certainly it constitutes a dispute. The written evidence produced by the moving party - KFC - is both that Thompson's equipment at the same time cooked "at parity" and "did not cook at parity". KFC's own evidence establishes that there exists a genuine dispute as to a material fact - did Thompson's equipment cook "at parity"? If it did, it passed KFC's test, and KFC was required to in good faith negotiate towards a "new and distinct" contract to buy, and KFC was further required under its agreements with its franchisees to approve Thompson's equipment for use by KFC's franchisees because KFC could not arbitrarily and capriciously withhold approval of equipment which was "at parity" with other approved equipment, KFC v. Diversified Pkg. Corp., 549 F.2d 368, 380, 381, ft. 11

and 12 (5th Cir. 1977); also KFC v. Diversified Pkg. Corp., 376 F.Supp 1136, 1139, 1146, 1147 (S.D. Fla. 1974).

KFC did not approve Thompson's equipment for use by its franchisees. KFC refused to enter into a contract with Thompson to buy his equipment. Therefore, KFC breached the "Joint Development Agreement" and did so without regard to the definition of the word "joint".

IV. The 1984 "Joint Development Agreement" is "Enforceable"

Thompson here alleged that in 1984 KFC violated his civil rights by refusing to enter into a "new and distinct" contract to buy his equipment. The District Court dismissed this cause of action under part "III" of the decision in Patterson v. McLean, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed. 136 (1989) (See Appendix at A-16 and 17), by finding that the 1984 violation of

Thompson's civil rights arose out of the performance of an "enforceable" contract which is the same "JDA" which the Court also found to be "unenforceable".

Thompson submits that the "JDA" simply cannot be found to be "unenforceable" for the purposes of depriving Thompson of his contractual rights, and at the same time be found to be "enforceable" for the purposes of depriving Thompson of his civil rights.

V. Patterson v. McLean

Further, this Court has held that the Civil Rights Act of 1964 (42 U.S.C.A. §1981 et. seq.) prohibits a racially motivated refusal to enter into a contract where the proposed contract "rises to the level of an opportunity for a new and distinct relationship," (Emphasis supplied) Patterson, supra, part IV at 2377 et. seq.

The use of the words "new and distinct" logically requires the existence of a contractual relationship and further requires the possibility of a second and different contractual relationship. In 1982/1984 the only contract which existed was the "JDA" under which KFC agreed to jointly test and evaluate Thompson's equipment. Here, the "new and distinct" contract, which KFC refused to enter into, was not the contract to test, but a "new and distinct" contract to buy. Clearly where the only existing relationship was a relationship to test, a contract to buy "arises to the level of an opportunity for a new and distinct relationship."

Thompson therefore submits at that the summary judgment level, there existed a dispute as to whether or not the future contract to buy rose out of the enforcement of the "unenforceable"/"enforceable"

"JDA". The Courts below obviously exceeded their authority and resolved that dispute; and the Courts below further improperly resolved that dispute by drawing all inferences in the light most favorable to the moving party - KFC.

Further, the decision of the Courts below is contrary to this Court's ruling at Patterson, Part IV, which permits a civil rights cause of action to enforce a "new and distinct" contract; or in the alternative, the decision of the Courts below is contrary to this Court's ruling at Patterson, Part III, in that the Courts below have now extended Patterson to exclude a civil rights cause of action for the refusal to contract where no enforceable contract existed.

CONCLUSION

Because KFC at the summary judgment level could not establish how, when, or

from whom it developed its own 10-3 cooker, and could not establish that Thompson "discovered" KFC's theft of trade secrets prior to February of 1984, KFC was reduced to the sophistry of arguing to the Courts below that events which could not have happened in Kentucky happened in Kentucky. To date, KFC's style of "advocacy" and "candor" to the Court has been successful because the District Court and the Sixth Circuit, in effect, have found as a matter of law that what cannot be is.

While the Sixth Circuit compounded its errors by erroneously finding that each of Thompson's 1984 breach of contract and violation of civil rights causes of action "stemmed from" KFC's 1967/1968 theft of trade secrets, the District Court did, at least, review the Complaint in this matter and recognized that Thompson's

1984 causes of action existed independently of Thompson's 1967/1968 causes of action. However, in order to dismiss Thompson's 1984 causes of actions, the District Court was compelled to find that the word "joint" as used in a joint development, joint testing, joint evaluating contract involving only two parties was vague; and was so apparently because joint could mean only one party and/or joint under the two party contract could mean that a third unidentified and unnamed party would be contractually bound. The District Court also felt compelled to find that it is not a fraud, nor a breach of contract, nor a breach of a party's inherent duty of good faith for Dr. Rao to conclude from the same set of tests, at the same time, and for the same purposes that Thompson's equipment passed KFC's testing and did not pass KFC's testing;

and the District Court further was compelled to conclude that it is legally possible for a contract to be totally unenforceable and at the same to be totally enforceable.

While the above may or perhaps should raise questions concerning the logic and consistency of the Courts below, other questions also remain.

Why would a group of otherwise competent businessmen refuse over a 20 year period to use and/or refuse to let its franchisees use equipment that those businessmen found to be "at parity" with other equipment and which they found also made the "perfect" product, and also did so at a cost savings of in excess of $1,000,000 a year, Alogaili v. National Housing Corporation, 743 F.Supp 1264, 1271, 1272 (N.D. Ohio, 1990)?

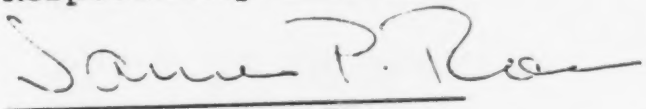
If KFC did not believe in its own mind, that it had a contractual/good faith duty to negotiate and to enter into a "new and distinct" contract to buy Thompson's equipment, why would Dr. Rao be compelled to change his "at parity" conclusion to a "not at parity" conclusion, Alogaili, supra?

Can a corporation which has a documented and admitted history of racial bias continue with impunity to refuse to enter into prospective, "new and distinct" contracts simply because it is known to have been racially biased?

Have the Courts below sanctioned a "win at all costs" style of advocacy and thereby voided, for calendar control reasons, the duty of candor owed to the Courts by attorneys as "officers of the Court", Demjanjuk, supra?

For the above stated reason, this Court should grant the Petition for Certiorari and reverse the decisions of the Courts below.

Respectfully submitted,



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APPENDIX

(Entered January 26, 1993)
(Memorandum granting summary judgment by Judge Edward H. Johnstone, Judge, United States District Court for the Western District of Kentucky - Louisville Div.)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NEAL W. THOMPSON, et al.
Plaintiffs

v. No. C85-0755-L(J)

KENTUCKY FRIED CHICKEN CORPORATION, et al.
Defendants

MEMORANDUM

The Plaintiffs brought this diversity action approximately seven years ago, alleging various torts and civil rights violations by the defendants, Kentucky Fried Chicken Corporation and Heublein, Inc. The defendants have moved the court for summary judgment. Discovery has been exhausted and the court heard oral arguments on the summary judgment motion on August 19, 1992. Both parties agree

that the motion for judgment is ripe. For the reasons stated below, the motion for summary judgment will be granted.

BACKGROUND

Specific facts pertaining to the plaintiffs' claims will be set forth as necessary. However, the following background information will serve as a general statement of the case:

The plaintiff, Neal Thompson, is an African-American entrepreneur. At various times in the 1960's, Thompson was employed by Kentucky Fried Chicken (KFC) and KFC franchisees to install cooking equipment. KFC restaurants used manually operated cooking devices which produced an inconsistent product.

By August of 1967, Thompson had independently developed an automated pressure cooking device to uniformly cook chicken conforming to the KFC recipe. One

special feature of this device was the rapid pressurized expulsion of the cooking oil with steam after the cooking cycle. Thompson describes this process as a "pressure drain". This feature allegedly produced a less greasy, better tasting product. Thompson's cooker also retained steam in the cooking vessel after the oil had been expelled, further cooking the chicken and producing a "steam cleaning" effect to reduce shortening absorption.

Beginning in August of 1967, Thompson embarked on a 20-year campaign to sell his cooker technology to KFC. Between 1967 and 1984, KFC evaluated the Thompson cooker on five separate occasions and each time declined to purchase the process. In the course of these dealings, KFC engineers and patent attorneys had the opportunity to closely inspect Thompson's cooker.

KFC was actively seeking to develop its own automatic cooking device prior to its first viewing of Thompson's machine. KFC had retained the consulting firm of Booze-Allen Applied Research to approach the problem. KFC had also entered into an agreement with L.S. Hartzog, a KFC franchisee from Texas, to purchase and develop an automatic pressure cooker of Hartzog's design and hired Southeastern Engineering Company to develop the Hartzog cooker. It is hotly disputed whether any of these sources developed a workable pressure drain system prior to Thompson's first demonstration of his device to KFC in 1967. However by 1969, KFC was leasing its own automatic cookers equipped with a pressure drain feature to its franchisees.

Thompson claims that KFC misappropriated his pressure drain technology. In his complaint filed

January 7, 1985, Thompson alleges the following causes of action in relation to his claim:

1. Misappropriation of trade secrets
2. Unjust enrichment
3. Violation of RICO
4. Racial discrimination
5. Breach of contract
6. Inducing a refusal to deal

Thompson originally filed this action in the Western District of Pennsylvania. Pursuant to KFC's motion for change of venue under 28 U.S.C. §1404(a) the case was transferred to this court.

CHOICE OF LAW

Generally, a federal court sitting in diversity must apply the choice of law rule of the state in which they sit. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). However, when a defendant obtains

a transfer of venue under 28 U.S.C. §1404(a) the law of the transferor forum applies. Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). Therefore, the court will follow Pennsylvania's choice of law rules.

In matters of substantive law, Pennsylvania follows the "interest analysis/most significant relationship" test for choice of law described in the Restatement (Second) of Conflict of Laws. Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964). This approach calls for the balancing of the relative interests and policies of each state regarding the subject matter and outcome of the litigation. Section 145, comment f to the Restatement indicates that in claims of misappropriation of trade secrets, the principal location of the defendant's wrongful conduct will usually

be given the greatest weight in determining the state whose local law controls.

Significantly, Thompson's claims are founded on the alleged wrongful use of information legitimately obtained by KFC, rather than a claim that KFC was wrongfully in possession of the information. In this instance, decisions regarding the use of Thompson's process occurred at KFC's headquarters located in Kentucky. Further, all of the testing of Thompson's equipment occurred in Kentucky. A joint Development Agreement signed by the parties in 1982 specifies that Kentucky law shall apply to that agreement. These factors weigh more heavily than Thompson's residence or the situs of the alleged trade secrets which he voluntarily revealed. The court finds that Kentucky has the most significant

relationship to this action and will apply Kentucky substantive law.*

MISAPPROPRIATION OF TRADE SECRETS AND UNJUST ENRICHMENT

Thompson claims that KFC misappropriated his pressure drain process by incorporating it into the KFC cooker sometime before 1969 without his knowledge or permission. KFC denies the allegations and contends that it is entitled to summary judgment on three separate

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* Pierce v. Rosettas Corp. et al, No. 88-5873 (E.D.Pa. April 5, 1991) (LEXIS Genfed library, Dist file) cited by the plaintiff is unpersuasive. In that case, all parties were located in Pennsylvania and the trade secrets were carried by employees from one company in Pennsylvania to another. Accordingly, the contacts with Pa. were much greater.

grounds; 1) KFC developed the concept of pressure drain independently, 2) the pressure drain cooking technology was not a trade secret, and 3) Thompson's claim is barred by the applicable statute of limitations. Because the court finds that Thompson's misappropriation claim is time barred, it is unnecessary to address the other arguments.

KFC argues that, because Kentucky has the most significant relationship to this action, Kentucky's statute of limitations should be applied to Thompson's trade secret claim. The court agrees, but for different reasons. Pennsylvania treats statutes of limitation as procedural and will generally apply its own law regarding limitations periods regardless of the substantive law applied. Butler v. Dravo Corporation, Keystone Division, 310 F.Supp. 1265 (W.D.Pa. 1970). However,

under Pennsylvania statute 42 Pa.C.S. §5521, foreign statutes of limitation are borrowed in certain situations. The "borrowing statute" provides that a claim "accruing outside this Commonwealth" shall be governed by the limitations period which first bars the claim. The court must therefore determine whether the action accrued outside Pennsylvania and, if so, whether the claim is barred by the foreign statute.

A claim arising under Pennsylvania law accrues at the time and place of the occurrence of the final significant event necessary to make the claim suable. Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18, 20 (3rd Cir. 1966). Mack Trucks expressly rejects the interest analysis approach for application of the borrowing statute in conflicts of law situations. The

significant event in this case was the actual use of the information obtained from Thompson and/or observation of his cooking device. As discussed above, this occurred in Kentucky where KFC's principal place of business is located. The action accrued in Kentucky for purposes of applying the borrowing statute. (See, Bates v.Cook, Inc., (D.C.Fla. 1984); (trade secret claim accrued in Indiana for purposes of Florida borrowing statute). Accordingly, the limitations period which first bars the claim will control.

The Pennsylvania limitations statute, 42 Pa.C.S. §5524, places a two year limitation on tort claims. Pennsylvania law adopts a discovery rule which would toll the running of the statute until the plaintiff knew or should have known of the injury. Thompson claims he did not have absolute knowledge that KFC was using the

pressure drain technology until 1984. Although KFC asserts that Thompson's deposition testimony refutes this position, it is unnecessary for the court to decide the matter because Kentucky's statute of limitations would bar the claim.

In Kentucky, the limitations period for bringing a misappropriation claim is 10 years after the cause of action accrued. KRS 413.160. The misappropriation occurred at least by 1969. Thompson does not dispute that his suit filed in 1985 would be barred under Kentucky law. Even if Thompson could utilize the discovery rule under the Pennsylvania statute, Pennsylvania would apply Kentucky's statute to bar the claim. The unjust enrichment claim is subject to the Kentucky limitations period of five

years for implied contracts, KRS 413.120, and is likewise time-barred.

RICO VIOLATIONS

Thompson alleges that KFC violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.§1961 et seq., through a pattern of mail and wire fraud activity designed to obtain his trade secrets. RICO §1962(c) renders criminally and civilly liable "any person" who, being employed or associated with an enterprise engaged in interstate commerce, conducts or participates in the conduct of its affairs "through a pattern of racketeering activity". The complaint catalogs numerous instances of interstate mail and wire communications between 1967 and 1984 which Thompson alleges were in furtherance of a scheme to defraud him.

KFC contends that Thompson cannot establish the requisite pattern of

racketeering activity because a single scheme to defraud a single victim does not satisfy the statutory requirement. The court arrives at the same conclusion with a slightly different analysis. The Supreme Court rejected the notion that multiple schemes or victims are necessary to establish a pattern of racketeering activity in H.J.Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). However, the Court made clear that a RICO plaintiff must prove continuity of racketeering activity. The linchpin of the Supreme Court's analysis of "continuity" is a threat of continuing criminal conduct. Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. H.J., 109 S.Ct. at 2902.

Thompson has failed to present the court with any facts indicating what, if any, trade secrets are claimed to have been misappropriated post 1968, the date when he alleges KFC began to use the pressure drain concept. The alleged predicate offenses occurred during a discrete period to accomplish a single objective which, by its nature, does not allow for repetition. Thompson does not allege that KFC engages in mail or wire fraud as a regular way of doing business, or that KFC engages in an enterprise of theft of trade secrets. There is simply no threat of continuing criminal activity as envisioned by RICO. The court concludes that Thompson does not allege a pattern of racketeering activity necessary to sustain a RICO claim.

DISCRIMINATION

Thompson believes that KFC's refusal to purchase and develop his cooking technology is motivated by bigotry. He claims that KFC engaged in a general pattern of racial discrimination against him prior to 1982. He also claims that KFC discriminated against him in the performance of a Joint Development Agreement in 1983-1984. Thompson brings his claims under 42 U.S.C. §1981 and alleges conspiracy under §§1985(3), 1986.

The claim of discrimination in the performance of the Joint Development Agreement is not actionable under §1981. By its terms, §1981 protects two rights: the right to make contracts and the right to enforce them free of discrimination. The scope of the statute does not extend to discrimination in the performance of the contract, as alleged here. Patterson

v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d(1989).

The remaining claims of discrimination are time-barred. Actions brought under 42 U.S.C. §1986 are subject to a one year limitations period. In actions filed under 42 U.S.C. §§1981 and 1985(3), the state statute of limitations for personal injury claims is applied. Pennsylvania has a two year statute, 42 Pa.C.S. §5524, and Kentucky's is one year, KRS §413.140(1)(a). Under either, the action was filed too late.

Admissions by Thompson establish that the acts of discrimination complained of occurred more than two years prior to the filing of the complaint. Copious deposition testimony indicates that Thompson believed he was being discriminated against by KFC as early as 1968. Therefore his present

discrimination claims were filed outside the limitations period.

BREACH OF CONTRACT

On February 7, 1983 KFC entered into a Joint Development Agreement for formal evaluation and testing of Thompson's cooker. Testing occurred in 1984 and KFC concluded that Thompson's technology did not offer any advantage over their existing cooking device. Count V of the Complaint asserts that KFC breached the contract by 1) excluding Thompson from testing, 2) refusing to provide Thompson with certain technical information, 3) falsifying test results, and 4) failing to act in good faith. The court has reviewed the Joint Development Agreement and finds that Thompson has failed to state a claim for breach of the Agreement.

The Agreement is four pages in length and contains no provisions regarding

Thompson's presence at testing done at KFC's laboratories. Although the document does mention that the cooker will be "jointly tested", the term is not defined. Further, there is no requirement stated that KFC provide any specific technical information to Thompson. On these points, the Agreement is either completely silent or too vague and ambiguous to be enforceable.

Thompson's brief opposing summary judgment contains no evidence other than unsupported accusation that any test results were falsified. Under the standards set forth in Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989), this is insufficient to withstand a motion for summary judgment. Likewise, Thompson's amorphous claim that the testing was not performed in good faith fails for a lack of substantive evidence.

INDUCING REFUSAL TO DEAL

Finally, Thompson claims that KFC interfered with prospective sales of his cooking device to KFC franchisees. This claim fails because Thompson admits that he had no such prospective sales. His claim is apparently based on what he believed the marketability of his cooker to be rather than evidence of actual interference. This claim, like most of Thompson's arguments in his brief opposing summary judgment, is a jumble of facts, accusation and innuendo devoid of legal support. As presented to the court, there is no triable issue and summary judgment is appropriate.

CONCLUSION

For the reasons stated above, the Defendant is entitled to summary judgment.

An appropriate order has been entered this 25th day of January, 1993.

EDWARD H. JOHNSTONE, JUDGE

United States District Court

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NEAL W. THOMPSON, et al.
Plaintiffs

v. No. C85-0755-L(J)

KENTUCKY FRIED CHICKEN
CORPORATION, et al.
Defendants

ORDER

For the reasons set forth in the memorandum filed this date, IT IS ORDERED that the defendant's motion for summary judgment be GRANTED. There is no just reason for delay, and this is a final and appealable order. This 25th day of January, 1993.

EDWARD H. JOHNSTONE, JUDGE
United States District Court

(Filed March 23, 1994 per Curiam)
(Decision of the United States Court of Appeals for the Sixth Circuit affirming the granting of Motion for Summary Judgment)

NOT RECOMMENDED FOR PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

No. 93-5158
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEAL W. THOMPSON; and PRECISION PROCESSING, INC., **Plaintiff-Appellants,**	)	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
v.	)	
KENTUCKY FRIED CHICKEN CORPORATION; AND HEUBLEIN, INC., **Defendants-Appellees.**	)	

BEFORE: NELSON and NORRIS, Circuit Judges; FORESTER, District Judge.*

---

*The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

PER CURIAM. Plaintiffs, Neal W. Thompson and Precision Processing, Inc., appeal the order of the district court granting summary judgment to defendants, Kentucky Fried Chicken Corporation and Heublein, Inc. The numerous claims made by plaintiffs in their lawsuit stemmed from their contention that trade secrets incorporated into their automatic pressure cooking device were misappropriated by defendants.

Having had the benefit of oral argument, and having considered the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in granting summary judgment to defendants.

Because the reasons judgment should be entered for defendants have been articulated by the district court, the issuance of a written opinion by this

court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is **affirmed** upon the reasoning employed by that court in its Memorandum Opinion entered January, 1993.

(Filed April 29, 1994)
(Order of the United States Court of Appeals for the Sixth Circuit denying Plaintiffs' Petition for Rehearing.)

No. 93-5158

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEAL W. THOMPSON; PRECISION PROCESSING, INC.	)	
Plaintiffs-Appellants,	)	
v.	)	ORDER
KENTUCKY FRIED CHICKEN CORPORATION; HEUBLEIN, INC.	)	
Defendants-Appellees.	)	

BEFORE: NELSON and NORRIS, Circuit Judges; and FORESTER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all

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*Hon. Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation

other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, Clerk

42 U.S.C.A. §1981 (Civil Rights Act of 1964)

In pertinent part is as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Rev.Stat. §1977.

Rule 10 of the Rules of the Supreme Court of the United States of America

In pertinent part is as follows:

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(c) When a . . . United States court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court.

No. 94-178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
SEP 1 1994
OFFICE OF THE CLERK

NEAL W. THOMPSON, and
PRECISION PROCESSING, INC.

Petitioners,

v.

KENTUCKY FRIED CHICKEN
CORPORATION, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE PARTIES

Pursuant to Supreme Court Rule 29.1, the parent companies and subsidiaries (except wholly owned subsidiaries) of respondents are: PepsiCo, Inc.

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IN THE
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NEAL W. THOMPSON, and
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent KFC Corporation ("KFC") respectfully submits this brief in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in Thompson v. Kentucky

Fried Chicken Corporation, No. 93-5158 (6th Cir. March 23, 1994)(per curiam).

STATEMENT OF THE CASE

Petitioners Neal W. Thompson and Precision Processing, Inc. filed a complaint in 1985 alleging misappropriation of trade secrets. Petitioners alleged that between 1967 and 1969, respondent KFC misappropriated the pressure drain feature of petitioners' pressure chicken cooker and, without compensating petitioners, used that feature in respondent's cooker. In an apparent effort to bolster their complaint, petitioners also alleged a variety of other claims including RICO violations, antitrust violations, unjust enrichment, breach of contract, tortious inducement of refusal to deal and discrimination in violation of the civil rights laws.

Petitioners conducted over five years of discovery in an effort to uncover evidence and facts to support their trade secret claim and other claims. Mountains of docu-

ments were produced, the parties answered copious written discovery including requests for admissions and close to 50 depositions were taken comprising thousands of pages of transcripts. During this five-year discovery period, petitioners agreed to dismiss with prejudice their antitrust claims.

After discovery confirmed that respondent did not misappropriate petitioners' trade secret claim, respondent filed a motion for summary judgment. In the motion, respondent also provided multiple alternate grounds showing why none of petitioners' claims were viable.

The District Court Decision. In January, 1993, the District Court for the Western District of Kentucky granted summary judgment for respondent.

The district court disposed of petitioners' trade secret and unjust enrichment claims because they were time barred. The district court also determined that petitioners' discrimination claims under 42 U.S.C. Sections 1981, 1985

and 1986 stated no claim. Allegations of racial bias in the performance of the 1983 Joint Development Agreement stated no claim because the civil rights statutes do not reach post-formation discrimination in the performance of a contract. The court determined that all other allegations of discrimination were time-barred because the applicable limitations period is only one year, and the conduct allegedly occurred between eighteen and three years before the filing of petitioners' original complaint.

The district court also dismissed petitioners' claims for breach of contract and inducing refusal to deal because more than five years of discovery showed that petitioners had no evidence to support these claims and there was nothing more than "a jumble of facts, accusation and innuendo devoid of legal support." Petition at A-20.

Finally, the district court dismissed petitioners' RICO claim because there was no pattern of racketeering activity necessary to sustain such a claim.

The Sixth Circuit Decision. Petitioners appealed the district court's decision. After the benefit of full briefing and oral argument, the Sixth Circuit, in a per curiam decision, affirmed the district court's grant of summary judgment for the reasons contained in the district court's opinion. On April 5, 1994, petitioners filed a petition with the Sixth Circuit for a rehearing en banc. The petition for rehearing was circulated to all the active judges of the Sixth Circuit. When no judge of the Sixth Circuit requested a vote for rehearing, the petition was referred to the members of the original Sixth Circuit panel that heard the petitioners' appeal. That panel further reviewed the petition for rehearing and, on April 29, 1994, denied petitioners' request for rehearing en banc.

REASONS FOR DENYING THE WRIT

Petitioners have cited no "special and important reasons" warranting a grant of the writ of certiorari. Sup. Ct. R. 10. The proceedings in the district court and the

Sixth Circuit have not "departed from the accepted and usual course of judicial proceedings . . . as to call for any exercise of this Court's power of supervision." Sup. Ct. R. 10. Furthermore, there is no conflict between the decision of the Sixth Circuit below and the decision of any other United States Court of Appeals or of this Court. This is simply a case where the petitioners disagreed with the district court and the court of appeals when those courts independently determined that there was no evidence to support petitioners' claims and others were barred as a matter of law. The Petition alleges no justification for review in this Court and indeed there is none.

THERE IS NO REVIEWABLE ISSUE RESULTING FROM THE DECISIONS OF THE COURTS BELOW

The district court and the Sixth Circuit did nothing that requires this Court to exercise its powers of supervision. Petitioners boldly assert that the courts below have "so far departed from the accepted and usual course of judicial proceedings" that this Court's review is necessary.

Yet petitioners point to nothing to support such an allegation except: (i) wild accusations that the courts below do not have the time, budget or the inclination to "sit at a civil trial brought by a black individual against a major corporation;" and (ii) accusations that the courts below improperly drew inferences in favor of respondent and granted respondent's motion for summary judgment. See Petition For Writ of Certiorari at 11-12. Neither statement could be further from the truth.

A. The District Court and the Sixth Circuit Gave Petitioners Every Opportunity To Present and Prove Their Claims.

A quick perusal of the proceedings below confirms that the district court provided every procedural and substantive opportunity for the petitioners to prove their trade secret and other claims. The civil docket sheet reflects that the voluminous record of the district court proceedings occupies eight binders and contains over 200 individual documents. A magistrate was appointed by the

district court to resolve discovery disputes. After five years of discovery, petitioners filed not only a brief but an appendix of 105 exhibits in opposition to respondent's summary judgment motion. Finally, as the summary judgment oral argument transcript confirms, the district court heard nearly four hours of oral argument and in fact reviewed and was familiar with all of petitioners' cited law and proffered evidence.

Petitioners' opportunity to prove their case did not end with the district court. On the appeal of the district court's grant of summary judgment, petitioners again filed a brief and a four-volume appendix of exhibits. Moreover, petitioners not only had the benefit of an oral argument before the Sixth Circuit, they also filed a petition for rehearing en banc. Thus, like the district court, the Sixth Circuit gave petitioners the opportunity to take advantage of every conceivable procedure available to them. The fact that this action has been actively pursued and heard

since 1985 belies petitioners' assertions that the courts below had no inclination to hear their action. Accordingly, petitioners' allegation that the courts below gave them short shrift is entirely spurious and this Court's supervision is unnecessary.

B. The District Court and the Sixth Circuit Properly Applied Accepted, Commonplace Principles of Law.

In the courts below, the issues on summary judgment were not novel. Indeed, issues regarding statutes of limitations, state contract and tort law and the federal civil rights laws involve everyday legal principles applied to the facts of this case. Moreover, aside from the reasons articulated by the district court, there were additional grounds to grant summary judgment on petitioners' claims that the district court never had to reach.

When resolving these issues, the courts below neither weighed evidence nor drew inferences in favor of respondent. Quite the contrary, in accordance with the

settled principles of Celotex Corp. v. Catrell, 477 U.S. 317 (1986), the district court below accepted petitioners' version of the facts. It was petitioners' own admissions and their lack of evidence (despite five years of discovery) that indisputably demonstrated that summary judgment for respondent was proper. For example, petitioners' RICO allegations failed to state a claim because petitioners had no evidence that respondent acted in any way that constituted a pattern of racketeering. Additionally, petitioners' breach of contract claim failed because there was "no evidence other than unsupported accusation" that respondents falsified the results of the tests conducted pursuant to the Joint Development Agreement.[1] Petition at A-19. Finally,

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[1] Petitioners' claim of falsified test results is an illustration of how they have obliterated the distinction between evidence and attorneys' arguments. Notwithstanding petitioners' arguments about respondent's supposed wrongdoing, the evidence showed that respondent did not falsify any test results under the Joint Development Agreement. Accordingly, the courts below properly reviewed the evidence, discredited petitioners' argument and, in

(continued...)

petitioners' inducing refusal to deal claim failed because petitioners admitted that they had no prospective sales or contracts with which respondent interfered. Petition at A-20.[2]

On appeal, the Sixth Circuit had the benefit of petitioners' briefs and oral argument in its review of, among other things, the above facts and the district court's decision. After this complete inquiry, the Sixth Circuit affirmed the district court's ruling for the exact reasons contained in the District Court's opinion. Contrary to

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[1](...continued)
accordance with the principles of Celotex, dismissed petitioners' breach of contract claim. Petition at A-19.

[2] As if these facts were not enough to warrant summary judgment, respondent also presented to the district court and to the Sixth Circuit alternative grounds for why each of petitioners' claims must fail. For example, respondent proved that petitioners' trade secret claim must fail because, in addition to the time bar, (i) respondent developed the concept of pressure drain independently; and (ii) the pressure drain cooking technology had already been developed and patented by others and was thus not a trade secret. Petition at A-8 - A-9.

petitioners' assertions, the courts below acted properly and, indeed, gave careful consideration to the applications of state statutes of limitations, state contract and tort law and federal civil rights statutes. Thus, what it boils down to is that petitioners are seeking one final opportunity to reargue issues which have been fully aired in the courts below.

Petitioners' brief betrays their intentions to do nothing except argue whether well settled legal principles were properly applied to this specific case and its specific facts. Indicative of what is to come, petitioners' first two questions present pure issues of fact that relate to whether the courts below applied the proper state's statute of limitations to petitioners' trade secret claim. Petition at i-ii. The remaining seven questions all flow in a similar vein and range from whether the courts below erred in finding the Joint Development Agreement unenforceably vague to whether respondents indeed acted prejudicially against petitioners. Petition at iii-vi. Put in this light, it becomes

clear that there is no reviewable issue here because certiorari petitions are not granted to review evidence and to discuss facts. United States v. Johnston, 268 U.S. 220, 227 (1925).

Although petitioners try to concoct an issue of law regarding whether respondents' refusal to exercise an option under a Joint Development Agreement constitutes discrimination prohibited by Section 1981, petitioners' attempt to do so must fail. Petitioners' brief does not disclose that they admitted that their discrimination claim is based on respondent's actions in the performance of the Joint Development Agreement.[3] Accordingly, the district

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[3] This is not a situation where the evidence is susceptible to a variety of interpretations. In the first set of request for admissions, petitioners were asked the following:

> Admit that any and all acts of racial discrimination allegedly committed by Defendants, other than those alleged acts of discrimination committed in connection with KFC's performance under the Joint Development

(continued...)

court and the Sixth Circuit properly determined that the complained-of misconduct fits squarely within the strictures that discriminatory performance of contractual obligations are not covered by Section 1981. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).[4]

---

[3](...continued)

> Agreement (including the testing that took place thereunder and its subsequent termination), occurred prior to January 1, 1983.

Petitioners admitted that the above statement was true. Regardless of petitioners' vociferous denials, petitioners' admission bars all of their discrimination claims. Their admission shows that, with the exception of the Joint Development Agreement, the complained-of acts occurred at least two years prior to the date of the complaint and are time-barred under a one-year statute of limitations. As for the Joint Development Agreement, petitioners admitted that the alleged discriminatory acts there occurred during the performance of a contract thus taking the actions outside of the reach of the civil rights statutes.

[4] Alternatively, petitioners' attempt to characterize the option as a new contract is unavailing because the Sixth Circuit has ruled that post-formation conduct cannot be turned into pre-formation conduct by simply alleging that a new contract was sought. See, e.g., Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505, 509 (6th Cir.), cert. denied, 111 S. Ct. 2917 (1991)

(continued...)

In short, the district court and the Sixth Circuit correctly applied accepted, commonplace principles regarding state statute of limitations, state contract and tort law and the civil rights statutes. Accordingly, this Petition really asks this Court to exercise its supervisory powers and become the third court to review the summary judgment record. There is no reason for this Court to do so.

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[4](...continued)
(failure to automatically renew contract does not impede right to "make or enforce" contracts and thus is not cognizable under Section 1981); see also, Rick Nolan's Auto Body Shop, Inc. v. Allstate Ins. Co., 718 F. Supp. 721 (N.D. Ill. 1989)(cannot avoid Patterson and turn post-formation conduct into pre-formation conduct by merely alleging that a new contract was at issue). Petitioners have neither given a reason why this rule is inapplicable in the instant case nor given any indication that there is any conflict with regard to this issue within the circuits.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: September 1, 1994

Respectfully submitted,

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No. 94-178

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OCTOBER TERM, 1994

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20 P

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

NEAL W. THOMPSON, and
PRECISION PROCESSING, INC.

Petitioners,

v.

KENTUCKY FRIED CHICKEN
CORPORATION, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent KFC Corporation ("KFC") respectfully submits this brief in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in Thompson v. Kentucky

Fried Chicken Corporation, No. 93-5158 (6th Cir. March 23, 1994)(per curiam).

STATEMENT OF THE CASE

Petitioners Neal W. Thompson and Precision Processing, Inc. filed a complaint in 1985 alleging misappropriation of trade secrets. Petitioners alleged that between 1967 and 1969, respondent KFC misappropriated the pressure drain feature of petitioners' pressure chicken cooker and, without compensating petitioners, used that feature in respondent's cooker. In an apparent effort to bolster their complaint, petitioners also alleged a variety of other claims including RICO violations, antitrust violations, unjust enrichment, breach of contract, tortious inducement of refusal to deal and discrimination in violation of the civil rights laws.

Petitioners conducted over five years of discovery in an effort to uncover evidence and facts to support their trade secret claim and other claims. Mountains of docu-

ments were produced, the parties answered copious written discovery including requests for admissions and close to 50 depositions were taken comprising thousands of pages of transcripts. During this five-year discovery period, petitioners agreed to dismiss with prejudice their antitrust claims.

After discovery confirmed that respondent did not misappropriate petitioners' trade secret claim, respondent filed a motion for summary judgment. In the motion, respondent also provided multiple alternate grounds showing why none of petitioners' claims were viable.

The District Court Decision. In January, 1993, the District Court for the Western District of Kentucky granted summary judgment for respondent.

The district court disposed of petitioners' trade secret and unjust enrichment claims because they were time barred. The district court also determined that petitioners' discrimination claims under 42 U.S.C. Sections 1981, 1985

and 1986 stated no claim. Allegations of racial bias in the performance of the 1983 Joint Development Agreement stated no claim because the civil rights statutes do not reach post-formation discrimination in the performance of a contract. The court determined that all other allegations of discrimination were time-barred because the applicable limitations period is only one year, and the conduct allegedly occurred between eighteen and three years before the filing of petitioners' original complaint.

The district court also dismissed petitioners' claims for breach of contract and inducing refusal to deal because more than five years of discovery showed that petitioners had no evidence to support these claims and there was nothing more than "a jumble of facts, accusation and innuendo devoid of legal support." Petition at A-20.

Finally, the district court dismissed petitioners' RICO claim because there was no pattern of racketeering activity necessary to sustain such a claim.

The Sixth Circuit Decision. Petitioners appealed the district court's decision. After the benefit of full briefing and oral argument, the Sixth Circuit, in a per curiam decision, affirmed the district court's grant of summary judgment for the reasons contained in the district court's opinion. On April 5, 1994, petitioners filed a petition with the Sixth Circuit for a rehearing en banc. The petition for rehearing was circulated to all the active judges of the Sixth Circuit. When no judge of the Sixth Circuit requested a vote for rehearing, the petition was referred to the members of the original Sixth Circuit panel that heard the petitioners' appeal. That panel further reviewed the petition for rehearing and, on April 29, 1994, denied petitioners' request for rehearing en banc.

REASONS FOR DENYING THE WRIT

Petitioners have cited no "special and important reasons" warranting a grant of the writ of certiorari. Sup. Ct. R. 10. The proceedings in the district court and the

Sixth Circuit have not "departed from the accepted and usual course of judicial proceedings . . . as to call for any exercise of this Court's power of supervision." Sup. Ct. R. 10. Furthermore, there is no conflict between the decision of the Sixth Circuit below and the decision of any other United States Court of Appeals or of this Court. This is simply a case where the petitioners disagreed with the district court and the court of appeals when those courts independently determined that there was no evidence to support petitioners' claims and others were barred as a matter of law. The Petition alleges no justification for review in this Court and indeed there is none.

THERE IS NO REVIEWABLE ISSUE RESULTING FROM THE DECISIONS OF THE COURTS BELOW

The district court and the Sixth Circuit did nothing that requires this Court to exercise its powers of supervision. Petitioners boldly assert that the courts below have "so far departed from the accepted and usual course of judicial proceedings" that this Court's review is necessary.

Yet petitioners point to nothing to support such an allegation except: (i) wild accusations that the courts below do not have the time, budget or the inclination to "sit at a civil trial brought by a black individual against a major corporation;" and (ii) accusations that the courts below improperly drew inferences in favor of respondent and granted respondent's motion for summary judgment. See Petition For Writ of Certiorari at 11-12. Neither statement could be further from the truth.

A. The District Court and the Sixth Circuit Gave Petitioners Every Opportunity To Present and Prove Their Claims.

A quick perusal of the proceedings below confirms that the district court provided every procedural and substantive opportunity for the petitioners to prove their trade secret and other claims. The civil docket sheet reflects that the voluminous record of the district court proceedings occupies eight binders and contains over 200 individual documents. A magistrate was appointed by the

district court to resolve discovery disputes. After five years of discovery, petitioners filed not only a brief but an appendix of 105 exhibits in opposition to respondent's summary judgment motion. Finally, as the summary judgment oral argument transcript confirms, the district court heard nearly four hours of oral argument and in fact reviewed and was familiar with all of petitioners' cited law and proffered evidence.

Petitioners' opportunity to prove their case did not end with the district court. On the appeal of the district court's grant of summary judgment, petitioners again filed a brief and a four-volume appendix of exhibits. Moreover, petitioners not only had the benefit of an oral argument before the Sixth Circuit, they also filed a petition for rehearing en banc. Thus, like the district court, the Sixth Circuit gave petitioners the opportunity to take advantage of every conceivable procedure available to them. The fact that this action has been actively pursued and heard

since 1985 belies petitioners' assertions that the courts below had no inclination to hear their action. Accordingly, petitioners' allegation that the courts below gave them short shrift is entirely spurious and this Court's supervision is unnecessary.

B. The District Court and the Sixth Circuit Properly Applied Accepted, Commonplace Principles of Law.

In the courts below, the issues on summary judgment were not novel. Indeed, issues regarding statutes of limitations, state contract and tort law and the federal civil rights laws involve everyday legal principles applied to the facts of this case. Moreover, aside from the reasons articulated by the district court, there were additional grounds to grant summary judgment on petitioners' claims that the district court never had to reach.

When resolving these issues, the courts below neither weighed evidence nor drew inferences in favor of respondent. Quite the contrary, in accordance with the

settled principles of Celotex Corp. v. Catrell, 477 U.S. 317 (1986), the district court below accepted petitioners' version of the facts. It was petitioners' own admissions and their lack of evidence (despite five years of discovery) that indisputably demonstrated that summary judgment for respondent was proper. For example, petitioners' RICO allegations failed to state a claim because petitioners had no evidence that respondent acted in any way that constituted a pattern of racketeering. Additionally, petitioners' breach of contract claim failed because there was "no evidence other than unsupported accusation" that respondents falsified the results of the tests conducted pursuant to the Joint Development Agreement.[1] Petition at A-19. Finally,

---

[1] Petitioners' claim of falsified test results is an illustration of how they have obliterated the distinction between evidence and attorneys' arguments. Notwithstanding petitioners' arguments about respondent's supposed wrongdoing, the evidence showed that respondent did not falsify any test results under the Joint Development Agreement. Accordingly, the courts below properly reviewed the evidence, discredited petitioners' argument and, in

(continued...)

petitioners' inducing refusal to deal claim failed because petitioners admitted that they had no prospective sales or contracts with which respondent interfered. Petition at A-20.[2]

On appeal, the Sixth Circuit had the benefit of petitioners' briefs and oral argument in its review of, among other things, the above facts and the district court's decision. After this complete inquiry, the Sixth Circuit affirmed the district court's ruling for the exact reasons contained in the District Court's opinion. Contrary to

---

[1](...continued)
accordance with the principles of Celotex, dismissed petitioners' breach of contract claim. Petition at A-19.

[2] As if these facts were not enough to warrant summary judgment, respondent also presented to the district court and to the Sixth Circuit alternative grounds for why each of petitioners' claims must fail. For example, respondent proved that petitioners' trade secret claim must fail because, in addition to the time bar, (i) respondent developed the concept of pressure drain independently; and (ii) the pressure drain cooking technology had already been developed and patented by others and was thus not a trade secret. Petition at A-8 - A-9.

petitioners' assertions, the courts below acted properly and, indeed, gave careful consideration to the applications of state statutes of limitations, state contract and tort law and federal civil rights statutes. Thus, what it boils down to is that petitioners are seeking one final opportunity to reargue issues which have been fully aired in the courts below.

Petitioners' brief betrays their intentions to do nothing except argue whether well settled legal principles were properly applied to this specific case and its specific facts. Indicative of what is to come, petitioners' first two questions present pure issues of fact that relate to whether the courts below applied the proper state's statute of limitations to petitioners' trade secret claim. Petition at i-ii. The remaining seven questions all flow in a similar vein and range from whether the courts below erred in finding the Joint Development Agreement unenforceably vague to whether respondents indeed acted prejudicially against petitioners. Petition at iii-vi. Put in this light, it becomes

clear that there is no reviewable issue here because certiorari petitions are not granted to review evidence and to discuss facts. United States v. Johnston, 268 U.S. 220, 227 (1925).

Although petitioners try to concoct an issue of law regarding whether respondents' refusal to exercise an option under a Joint Development Agreement constitutes discrimination prohibited by Section 1981, petitioners' attempt to do so must fail. Petitioners' brief does not disclose that they admitted that their discrimination claim is based on respondent's actions in the performance of the Joint Development Agreement.[3] Accordingly, the district

---

[3] This is not a situation where the evidence is susceptible to a variety of interpretations. In the first set of request for admissions, petitioners were asked the following:

> Admit that any and all acts of racial discrimination allegedly committed by Defendants, other than those alleged acts of discrimination committed in connection with KFC's performance under the Joint Development

(continued...)

court and the Sixth Circuit properly determined that the complained-of misconduct fits squarely within the strictures that discriminatory performance of contractual obligations are not covered by Section 1981. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).[4]

---

[3](...continued)

> Agreement (including the testing that took place thereunder and its subsequent termination), occurred prior to January 1, 1983.

Petitioners admitted that the above statement was true. Regardless of petitioners' vociferous denials, petitioners' admission bars all of their discrimination claims. Their admission shows that, with the exception of the Joint Development Agreement, the complained-of acts occurred at least two years prior to the date of the complaint and are time-barred under a one-year statute of limitations. As for the Joint Development Agreement, petitioners admitted that the alleged discriminatory acts there occurred during the performance of a contract thus taking the actions outside of the reach of the civil rights statutes.

[4] Alternatively, petitioners' attempt to characterize the option as a new contract is unavailing because the Sixth Circuit has ruled that post-formation conduct cannot be turned into pre-formation conduct by simply alleging that a new contract was sought. See, e.g., Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505, 509 (6th Cir.), cert. denied, 111 S. Ct. 2917 (1991) (continued...)

In short, the district court and the Sixth Circuit correctly applied accepted, commonplace principles regarding state statute of limitations, state contract and tort law and the civil rights statutes. Accordingly, this Petition really asks this Court to exercise its supervisory powers and become the third court to review the summary judgment record. There is no reason for this Court to do so.

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[4](...continued)
(failure to automatically renew contract does not impede right to "make or enforce" contracts and thus is not cognizable under Section 1981); see also, Rick Nolan's Auto Body Shop, Inc. v. Allstate Ins. Co., 718 F. Supp. 721 (N.D. Ill. 1989)(cannot avoid Patterson and turn post-formation conduct into pre-formation conduct by merely alleging that a new contract was at issue). Petitioners have neither given a reason why this rule is inapplicable in the instant case nor given any indication that there is any conflict with regard to this issue within the circuits.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: September 1, 1994

Respectfully submitted,

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In the
SUPREME COURT OF THE UNITED STATES
October Term 1994

NEAL W. THOMPSON, and
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITIONERS' REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A. RULE 15 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 15 of the Rules of the Supreme Court of the United States, states in part:

> In addition to other arguments for denying the petition, the brief in opposition should address any

> perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted... Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements **in the brief in opposition**, and not later.... (emphasis in original and underlining supplied).

B. UNDISPUTED FACTS AND ISSUES - RULE 15

Having been "admonished" of their "obligation" to this Court, Counsel for KFC has not "pointed out" any "misstatements of fact or law" with regard to, but not by way of limitation, the following facts or issues and it is therefore undisputed that:

1. The facts set forth at Thompson's "Statement of Case" are accurate. (See Petition at pages 3-11.)

2. Patterson v. McLean, 491 U.S. 164, 109 S.Ct. 2363, 2377, 105 L.Ed. 136 (1989) does not hold that an "unenforceable" contract to test equipment acts as an absolute bar to a civil rights cause of action arising out of a refusal to enter into a "new and distinct" contract to buy equipment. (See "Questions Presented" Number 5 at Petition page IV, and Petition at pages 17 through 25.)

3. The Courts below erred in finding that it is legally or evenly logically possible for the same contract to be at the same time "unenforceable" so as to deprive Thompson of his contractual rights and to be at the same "enforceable"

so as to deprive Thompson of his civil rights. (See "Questions Presented" Number 4 at Petition page III, Petition at pages 17 through 25.)

4. No event or events relative to KFC's 1967-1968 theft of trade secrets took place in Kentucky, therefore it was and is improper to apply Kentucky's tort statute of limitations under either the substantive law of Kentucky or under the conflicts of laws of Pennsylvania (see "Questions Presented" Numbers 1 and 2 at Petition i and ii; and Petition at pages 4, 5, 6, 12, 13, 14, 15, 16, 17 and 26.)

5. "Counsel" for KFC violated its duty of candor to the Courts below by affirmatively averring to the Courts below that if KFC misappropriated

Thompson's trade secrets, that theft occurred in a place where no event occurred, or where no event could have occurred. (See "Questions Presented" Numbers 1 and 2, at Petition pages i and ii; and Petition at pages 4, 5, 6, 12 - 17 and 26.)

6. The Sixth Circuit erred in finding that all of Thompson's causes of action "stemmed from" the 1967-1968 theft of trade secrets. Not only did the District Court find to the contrary, but neither KFC nor Thompson ever argued that all of Thompson's causes of action "stemmed from" KFC's 1967-1968 theft of trade secrets (see KFC Brief in Opposition at pages 3 and 4; and Petition at "Questions Presented" Number 3, at Petition iii, and Petition at pages 16, 17, 26 and 27.)

7. In 1984 Dr. Rao, the head of KFC's Research and Development Department, prepared at the same time and for the same purposes two "Management Summaries" wherein he summarized the one set of tests conducted entirely by KFC. For reasons that neither Dr. Rao, nor KFC, nor KFC's "Counsel" can explain, Dr. Rao concluded in the version of "Management Summary" given to the Chief Executive Officer of KFC that Thompson's equipment did cook "at parity" and therefore did pass KFC's tests; and in the version of the "Management Summary" given to Mr. Thompson, Dr. Rao concluded from the same set of tests that Thompson's equipment did not cook "at parity" and therefore did not pass KFC's tests (see Petition at pages 8-11).

8. That in the early 1980s, when KFC had admitted to a poor history of hiring and contracting with minorities, KFC refused to buy, or use, or approve equipment manufactured by a black man even though KFC's own tests proved that Mr. Thompson's equipment not only cooked "the perfect Kentucky fried chicken", but did so not only "at parity" with other equipment used or approved by KFC, but also did so at a savings, documented entirely by KFC, in excess of $1 million a year (see Petition at pages 7-11).

C. AFFIRMATIVE MISREPRESENTATIONS OF FACT AND LAW BY KFC

KFC devotes most of its 15 page Brief to a recital of the procedural history of this case which is not disputed or particularly relevant. KFC then seems to

argue that Thompson's Petition, as well as apparently all other petitions, should be denied based solely upon the showing of a long docket sheet which apparently irrefutably establishes that there is no need for this Court to review the findings of any of the courts below.

KFC, then, at page 13 sites United States vs. Johnston, 268 U.S. 220, 227 (1925) apparently for the proposition that this Court cannot review the evidence or the facts in order to determine whether the Courts below, at the Summary Judgment level, properly applied those facts and that evidence to the Federal Rules of Civil Procedure (i.e. Rule 56), to the United States Code (i.e. 42 U.S.C.§1981, 1985, and 1986), or to the prior decisions of this Court (i.e. Patterson vs. McLean, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed. 136 [1989]).

The purpose of the above arguments was apparently to fill up 10 or 12 pages of KFC's Brief which would have otherwise had to be left blank.

Thompson's only other response to the bulk of KFC's Brief is to simply refer this Court to its own review of summary judgment decisions in Celotex Corp. vs. Catrell, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) as also cited by KFC at page 10 of its Brief here, as well as Matsushita vs. Zenith, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

At page 3 of its Brief KFC states that:

> "After discovery confirmed that respondent did not misappropriate petitioners' trade secret claim (sic), respondent filed a motion for summary judgment." (parenthesis and underlining supplied)

The opening phrase of the above quote is a misrepresentation of the record by KFC's "Counsel".

No Court has found that KFC did not misappropriate Thompson's trade secrets.

To the contrary, the District Court at the Summary Judgment level, stated that the issue of misappropriation of Thompson's trade secrets by KFC was "hotly disputed" (see Appendix at A-4).

This Court's attention is also directed to footnote 2 at page 11 wherein KFC affirmatively avers that KFC also "proved" by "alternative grounds" that Thompson's misappropriation claim "must fail". At footnote 2 KFC paraphrases the middle of a paragraph from the District Court's Opinion, but KFC deletes the conclusion of the District Court which is that the District Court did not "address" KFC's "alternative grounds" of proof.

At page 6 of its Brief, KFC states that there is no conflict between the Sixth Circuit and this Court.

Said statement is incorrect.

The Sixth Circuit has held that Thompson cannot bring a civil rights cause of action arising out of a refusal to enter into a contract when no prior "enforceable" contract exists and/or that an "unenforceable" contract is an absolute bar to a civil rights cause of action arising out of a refusal to enter into a contract and/or an "unenforceable", but yet "enforceable" contract is an absolute bar to a cause of action arising out of the refusal to enter into a "new and distinct" contract.

Clearly the Sixth Circuit is in conflict with the decision of this Court at Patterson, supra, Part IV at 2377 et seq.

This Court has simply held in Patterson, at Part IV at 2277 et seq. that a cause of action for a refusal to enter into a "new and distinct" contract remains viable even though the cause of action arose out of or during the existence of an "enforceable" contract.

Further and contrary to the affirmative misrepresentation by KFC, Thompson does not allege that KFC refused to enter into a contract to retest his equipment, or that KFC refused to renew the contract to test. The contract which KFC refused to enter into is the "new and distinct" contract under which KFC would purchase Thompson's equipment after the contract to test had been completed. (see KFC footnote #4 at page 14)

At footnote No. 1 at page 10 of KFC's Brief, KFC again, as it did to the Courts

below, misrepresents the basis of another of Thompson's causes of action.

Thompson does not allege that KFC falsified the results of any of the individual test conducted by KFC. Thompson alleges that KFC's Dr. Rao fraudulently summarized and evaluated the individual tests when he prepared and "kept two sets of books" - one set used internally which stated that KFC's individual tests proved that Thompson's equipment did cook "at parity" and therefore did pass KFC's tests, and another version which was given to Thompson which states that the same tests proved that Thompson's equipment did not cook "at parity" and did not pass KFC's test (see Petition at pages 8, 9, 10 and 11, and pages 1, 2 and 6 supra).

Not only have the Courts below, at the Summary Judgment level, exceeded their

authority by resolving a factual dispute (i.e. choosing which set of KFC's books to believe), but the Courts below improperly resolved that factual dispute in favor of the moving party (KFC) as opposed to the non-moving party (Thompson). Further, even though it is not disputed that KFC "kept two sets of books", the Courts below ignored reality and found that Thompson had "no evidence (of a fraud, or of a breach of contract, or of a racial bias) other than unsupported accusations" (see Petition at Appendix A-19 and KFC's Brief in opposition at page 10).

At page 12 of KFC's Brief, KFC argues that the Joint Development Agreement was and is "unenforceable", but at pages 13 and 14 and at footnotes 3 and 4 of KFC's Brief, KFC argues that Thompson's civil rights cause of action is barred because said cause of action arose out of "the

performance (of KFC's) contractual obligation" under the Joint Development Agreement which at the page before was an "unenforceable" contract and was therefore a document which by definition could not legally or logically give rise to any enforceable "contractual obligations." (Also, see pages 11 and 12 supra.)

D. CONCLUSION

Notwithstanding the undisputed fact that the Complaint alleges otherwise, notwithstanding the undisputed fact that both Thompson and KFC argued to the contrary and notwithstanding the undisputed fact that the District Court agreed with Thompson and KFC, the Sixth Circuit, without any factual or legal basis and without the support of any party to this action, concluded that Thompson's 1982/1984 breach of contract, racial

discrimination and fraud causes of action all "stemmed from" KFC's 1967/1968 theft of trades secrets.

Said conclusion is sheer folly.

KFC misappropriated Thompson's trade secrets 15 years before Dr. Rao's fraud and 15 years before the Joint Development Agreement was written.

Further, and contrary to the law, as well as to the laws of nature and physics, the Sixth Circuit and the District Court, as alleged by KFC, held that the 1967/1968 theft of Mr. Thompson's trade secrets occurred in a place where nothing could have occurred and in a place where nothing in fact did occur.

Further the Courts below and KFC held and argued that the Joint Development Agreement is "enforceable" for purposes of depriving Mr. Thompson of his civil rights and that <u>at the same time the same agree-</u>

ment is "unenforceable" for the purposes of depriving Mr. Thompson of his contractual rights.

Next, the Courts below inexplicably described Dr. Rao's fraudulent keeping of two sets of books as "no evidence (of fraud, breach of contract or racial bias) other than unsupported accusations".

In view of the above the undersigned is reminded of the dream or (nightmare) of Abram Jasper, a black politician of the late 1800s. Mr. Jasper dreamt that he had died and that St. Peter had denied him access to heaven because Mr. Jasper had walked to heaven as opposed to riding well "mounted" to heaven as was required. On his way away from heaven Mr. Jasper met Mr. Horace Greeley, a prominent newspaper editor and a presidential candidate of that time. Mr. Greeley, a white man, was also walking to heaven. After Mr. Jasper

disclosed the secret of getting into heaven to Mr. Greeley, Mr. Greeley informed Mr. Jasper that if Mr. Jasper acted as Mr. Greeley's "mount", they would both jointly be able to ride into heaven. When Mr. Greeley, riding his "mount", reached heaven; St. Peter, of course, told Mr. Greeley that he certainly could enter into heaven, but that before doing so Mr. Greeley would have to tie-up his "mount" outside. Mr. Greeley did so and entered heaven; Mr. Jasper was left "tied-up" and "outside". [Melville D. Landon, King of the Platform and Pulpit (Chicago: Werner Company, 1895) pp. 558-59.]

As irony would have it, Mr. Jasper spoke of his dream during a speech given in Louisville, Kentucky.

Here, and, at least in part, because of the affirmative misrepresentations of fact and law made to the Courts below by

Counsel for KFC, the Courts below have made decisions which are diametrically opposed, which violate logic, the law and the laws of nature and physics, and which also violate this Court's holding in Patterson at part IV.

As a result, a man who is black now stands tethered "outside" the protection of reason and the law.

Surely, it must be clear that:

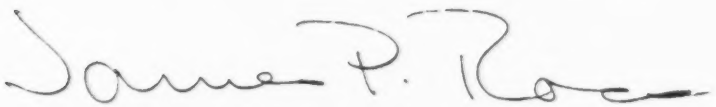
1. The Courts below have decided an important question of federal law in conflict with this Court's decision in Patterson [see Rule 10.1(c) of the Rules of the Supreme Court of the United States];
2. The Courts below and KFC and KFC's counsel have "...so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of

supervision...." [see Rule 10.1(a)], and

3. The Briefs here show "special and important reasons" for this Court to grant Certiorari.

Dated: September 22, 1994.

Respectfully submitted.



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